Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
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85 - 1786

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TIDELAND ELECTRIC MEMBERSHIP CORPORATION,
Petitioner

v.

CHARLES HASSINGER, Administrator of the Estate of STANLEY H. HASSINGER, III, JANET MEAD PROCTOR, Administratrix of the Estate of ROBERT DIEGO PROCTOR, JAMES B. POWELL, Administrator of the Estate of STUART L. POWELL, COAST CATAMARAN CORPORATION and THE COLEMAN COMPANY, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

DOES A TORT OCCURRING SEAWARD OF THE MEAN HIGH WATER LINE BUT NOT NECESSARILY UPON WATER MEET THE SITUS REQUIREMENT OF *EXECUTIVE JET*?

DOES THE ACT OF CARRYING A LIGHTWEIGHT SAILBOAT ASHORE CONSTITUTE NAVIGATION, THEREBY RENDERING ANY IMPEDIMENT TO SUCH ACT AN "OBSTRUCTION TO NAVIGATION" AND HENCE A MATTER OF TRADITIONAL ADMIRALTY CONCERN?

PARTIES TO THE PROCEEDING

The caption lists all parties to the proceeding. Coast Catamaran Corporation, named as a Respondent herein, is a Co-Defendant in all three cases. Coast Catamaran Corporation has previously filed with this Court a Petition for Certiorari to review the judgment of the Circuit Court (No. 85-1659). The Petitioner, Tideland Electric Membership Corporation, has no corporate parents, subsidiaries, or affiliates.

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NOTE: Tideland Electric Membership Corporation adopts by reference the entirety of the Appendix previously filed by Coast Catamaran Corporation, attached to its Petition for Certiorari, which appears of record in Case No. 85-1659. As the Appendix filed by Coast Catamaran Corporation includes all documents necessary to this Petition, a duplicative Appendix does not appear herein.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS IN COURTS BELOW

The District Court, by Memorandum of Decision dated April 18, 1985 and Order dated May 9, 1985 found that it was empowered to determine the controversy as to this Petitioner by reason of admiralty jurisdiction. The Circuit Court allowed an interlocutory appeal on this jurisditcional question, affirmed the District Court's decision and denied Co-Defendant Coast Catamaran Corporation's Petition for Rehearing and Suggestion for Rehearing in banc by Order dated February 6, 1986.

GROUNDS OF JURISDICTION

Jurisdiction to this Court is invoked pursuant to 28 U.S.C.A. Section 1254(1) (1968) to review an opinion of the U.S. Court of Appeals for the Fourth Circuit dated January 8, 1986 (22-A) and the Order of that court dated February 6, 1986 (35-A) denying Coast Catamaran Corporation's Petition for Rehearing and Suggestion for Rehearing in banc.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. Const., art. III, Sec. 2, cl. 1.

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases effecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between the Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

28 U.S.C. § 1333 Admiralty, Maritime and Prize Cases.

> "The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize."

STATEMENT OF THE CASE

These tort cases arose from the electrocution of three North Carolina residents which occurred when the aluminum mast of the sailboat they were carrying ashore contacted a power line owned and operated by Tideland Electric Membership Corporation, (Petitioner), a North Carolina corporation providing electric service to portions of five counties in eastern North Carolina.

Respondents brought suit against Petitioner and the sailboat manufacturer in the United States District Court for the Eastern District of North Carolina, invoking Admiralty jurisdiction and Federal Question jurisdiction as to Petitioner. Petitioner filed a timely Motion to Dismiss for lack of subject matter jurisdiction. By Memorandum of Decision dated April 18, 1985, the trial court dismissed the Respondents' Federal Question claims, but found that admiralty jurisdiction was present. This jurisdictional ruling is at issue in this Petition for writ of certiorari.

The power line in question ran parallel and adjacent to North Carolina Highway 12 in the village of Ocracoke on the Outer Banks of North Carolina. Highway 12, at the site of the accident, lies in close proximity to the waters of Silver Lake. Silver Lake is a tidal body of water. The status of the tide at the time of the accident is a matter of some dispute. The location of the sailboat and the decedents with respect to the water's edge at the time of the accident is also disputed. While it is undisputed that at the moment the mast contacted the power line the decedents were *carrying* or *pulling* the boat, rather than sailing it, the evidence is inconclusive as to whether the decedents or any portion of the boat were in the water at that time.

IMPORTANT REASON FOR ALLOWANCE OF WRIT

I. This Is The First Circuit Court Decision To Hold That, In Order For Federal Admiralty Jurisdiction To Exist, The Situs Requirement Of *Executive Jet* Does Not Require A Tort To Occur On Water, But Only That The Tort Occur Below The Mean High Water Line.

This Court, in *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 93 S. Ct. 493 (1972), summarized the *situs* requirement for admiralty tort jurisdiction as follows: "if the wrong occurred *on* navigable waters, the action is within admiralty jurisdiction; if the wrong occurred *on land*, it is not." *Id.* at 253, 93 S. Ct. at 497 (emphasis added). The District Court was unable to make the single critical finding required by *Executive Jet*, that the tort occurred *on* the water. Rather, the District Court sidestepped this requirement by declaring that admiralty tort jurisdiction extended at all times to the mean high water mark, regardless of the state of the tide. In affirming the District Court's decision, the Circuit Court determined that the term "navigable waters" includes "all areas within the 'ebb and flow of the tide,'" and therefore, federal admiralty jurisdiction would attach to a tort occurring below the mean high water mark, even if the tide was out at the time of the incident.

In its analysis of prior law, however, the Circuit Court indiscriminately relied upon non-tort cases for the proposition that admiralty tort jurisdiction extends at all times to the mean high water line, wherever that is. The principal case relied upon by the Circuit Court is *The Steamship Jefferson*, 215 U.S. 130 (1909), which involved a claim for *salvage* by the libellant, who had extinguished a fire on the vessel in question while it lay in dry dock. Because a claim for salvage is a creation of admiralty law designed to encourage the rescue of ships and their cargo, it is understandable that this Court chose to extend the incentive provided by the sal-

vage doctrine to rescue of a ship in dry dock, where such claims previously had been available only to those who rescued ships on water. This is similar to the situation found in suits upon maritime contracts, which may be brought in admiralty regardless of the situs of the contract, because of the importance of such contracts to maritime commerce. *The Steamship Jefferson*, because it involves a *salvage* claim, is not helpful in determining the question of jurisdiction with respect to *torts*.

The Circuit Court also relied upon *United States v. Stoeco Homes, Inc.*, 498 F.2d 597 (3rd Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) in finding that admiralty tort jurisdiction extended at all times to the mean high water mark. *Stoeco Homes*, however, like *The Steamship Jefferson*, had nothing to do with a maritime tort action. Rather, *Stoeco Homes* involved the interpretation and application of a portion of the Rivers and Harbors Appropriation Act of 1899, as applied to a defendant who was attempting to develop an area which had been a tidal marsh. Thus, it is unpersuasive authority for holding that admiralty tort jurisdiction extends to the mean high water line. In its opinion, the Circuit Court cited other appellate decisions which also referred to the mean high water line, but none of those decisions involved a question of admiralty jurisdiction with respect to tort actions, as here.

At least one other court has searched for some authority on this particular issue, but found none. *See, Boudlouche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir. 1980) ("we have found no cases where maritime jurisdiction has been extended to an injury that occurred entirely on land as a result of a vessel which was ashore"). Thus, the Circuit Court's decision here upholding admiralty jurisdiction is an unprecedented and unwarranted extension of federal jurisdiction over ordinary tort claims which are as readily determinable in the state courts as the federal courts.

The decision also complicates what had heretofore been a rule easy of application: if the tort occurred upon the water, admiralty jurisdiction applied; if the tort occurred upon the land, jurisdiction was vested in the state courts. The water's edge constantly provided a clear demarcation of the limit of admiralty tort jurisdiction. The mean high water line, on the other hand, is not an easily ascertainable boundary. It is an imaginary line which requires specialized training to properly locate. In many places in the United States, this imaginary line cannot be or has not been located. The Circuit Court's extension of admiralty tort jurisdiction to the intertidal area, regardless of the actual location of the tide, is thus unsupported by practical considerations as well as prior case law.

II. The Circuit Court Has Redefined "Navigation", Which Is Such An Important Concept In Admiralty Law That Its Meaning Should Be Settled By This Court.

The Circuit Court affirmed the District Court's decision that the act of beaching a sailboat constitutes "navigation" until the vessel is removed from the reach of the tides. Neither the District Court nor the Fourth Circuit has cited any authority whatsoever for this view. Navigation in the traditional sense, of course, involves the piloting of vessels *upon the water*. *See, Black's Law Dictionary* at 926 (5th Ed. 1979). In this sense, navigation is a concept with which admiralty law is intimately concerned. Accordingly, admiralty law recognizes certain rules of navigation, fixes liability upon parties who violate them, and also has the power to fix liability upon persons obstructing such navigation. The Circuit Court, by holding that the act of pulling a sailboat across a beach constitutes navigation, has created an entirely new dimension to the sphere of traditional admiralty concerns. This holding is particularly significant in an age of ever-

changing technology which has already begun to blur the distinctions between watercraft and land vehicles. Because the term "navigation" invokes many different aspects of the law of admiralty, including jurisdiction, this Court should determine whether the acts of the decedents at the time of their deaths should be defined as "navigation." If this Court should determine that such activity does not constitute navigation, then the premise of the Circuit Court's finding of the *nexus* requirement of *Executive Jet* collapses.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), this Court considered the *nexus* requirement of *Executive Jet* as it related to cases involving pleasure craft. This Court, by a five to four margin, held that the *nexus* requirement was met in cases involving pleasure craft *where the complaint alleges navigational error.* Of course, the Respondents here do not make such allegations. Absent navigation, and the concomitant allegation of obstruction to navigation, also absent, there is nothing upon which to support a finding that the *nexus* requirement has been met here.

CONCLUSION

This tort action, involving claims by North Carolina residents against a North Carolina corporation, is clearly capable of just and efficient adjudication by the courts of that state. The extension of federal admiralty jurisdiction to a land-based tort claim is an unjustified encroachment over interests which are purely local in nature. The Circuit Court has articulated a new rule of admiralty jurisdiction which is destined to create confusion and encourage needless and wasteful litigation by land-based tort claimants seeking the relaxed benefits of admiralty law which, for centuries, has been reserved for seamen. For the reasons stated above, certiorari is necessary to insure that federal admiralty jurisdiction will not be ex-

tended beyond its proper limits as envisaged by the writers of the Constitution.

Respectfully submitted this 1st day of May, 1986.

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Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1659
No. 85-1786

In The
Supreme Court of the United States
October Term, 1985

COAST CATAMARAN CORPORATION, *et al.*,
Petitioners,

v.

CHARLES R. HASSINGER, *et al.*,
Respondents.

TIDELAND ELECTRIC MEMBERSHIP CORPORATION,
Petitioner,

v.

CHARLES R. HASSINGER, *et al.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS HASSINGER, PROCTOR, AND POWELL IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the mean high water line the boundary of navigable waters for the determination of admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740?

2. Is the beaching of a sailboat in navigable waters a traditional maritime activity pertinent to the determination of admiralty jurisdiction under 28 U.S.C. § 1333 and 46 U.S.C. § 740?

3. Does the wrongful death of sailors in navigable waters caused by a defective sailboat mast bear a sufficient relationship to traditional maritime activity to require the application of admiralty law in a diversity action brought under 28 U.S.C. § 1332 and the "saving to suitors" clause of 28 U.S.C. § 1333(1)?

PARTIES TO THE PROCEEDING

The petitioners in case no. 85-1659 are Coast Catamaran Corporation and The Coleman Company, Inc. The respondents are Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger III; Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor; James B. Powell, Administrator of the Estate of Stuart L. Powell; and Tideland Electric Membership Corporation.

The petitioner in case no. 85-1786 is Tideland Electric Membership Corporation. The respondents are Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger III; Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor; James B. Powell, Administrator of the Estate of Stuart L. Powell; Coast Catamaran Corporation; and the Coleman Company, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 781 F.2d 1022. The memorandum decision of the United States District Court for the Eastern District of North Carolina is reported at 627 F. Supp. 65.[1] The opinions are also reprinted as appendices to the Petition of Coast Catamaran.

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JURISDICTION

The Respondents suggest that the Petition of The Coleman Company, Inc., is moot and does not present a case or controversy for consideration by this Court. Coleman was dismissed from these actions by the United States District Court for the Eastern District of North Carolina in an order of summary judgment dated October 31, 1985, reported at 622 F. Supp. 146 (E.D.N.C. 1985). The Respondents are not contesting that dismissal.

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STATUTES INVOLVED

28 U.S.C. § 1333. Admiralty, Maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

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[1]The memorandum decision of the District Court in the Hassinger and Proctor cases was applied to the Powell case in an order dated May 29, 1985.

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

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STATEMENT OF THE CASE[2]

Three sailors were electrocuted as they were beaching a sailboat in tidal waters in Silver Lake harbor at Ocracoke Island, North Carolina, on June 5, 1982. They were nearing the end of a thirty-mile voyage across Pamlico Sound from the mainland of North Carolina. 627 F. Supp. at 68. The top of the mast of the sailboat struck an uninsulated and unmarked overhead power line of Tideland Electric Membership Corporation located seaward of the mean high water line. The sailors were also seaward of the mean high water line at the time of their deaths. 781 F.2d at 1028.

Silver Lake is the harbor of Ocracoke Island and is connected by a navigable channel to Pamlico Sound and thence to the Atlantic Ocean. It is a tidal body of water subject to the ebb and flow of the tide. Its waters are used for commercial purposes by ferry boats and fishing boats. 627 F. Supp. at 68.

The Hobie Cat sailboat was a recreational sailboat designed and manufactured by Coast Catamaran. The mast and rigging of the sailboat were conductive to electricity and contained no insulating materials to protect sailors from death or injury from contact with overhead power lines. The sailboat was designed, advertised, and sold as a boat suitable for launching and retrieving directly off a beach.

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[2]The Respondents incorporate by reference all the findings in the Fourth Circuit and District Court opinions reported at 781 F.2d 1022 and at 627 F.Supp. 65.

The Respondents are the personal representatives of the estates of the deceased sailors. They are residents of North Carolina. These wrongful death actions were brought against Tideland, a North Carolina corporation, for negligence in the maintnance of the low overhead power line, which was unreasonably dangerous to the launching and beaching of sailboats and which was an obtruction to navigation. The Respondents also alleged that Coast Catamaran, a California corporation, was liable for a dangerously defective design and for failure to give adequate warning of the electrocution hazard. Although the boats were intended to be used for launching and beaching in areas where there were significant hazards of contact with overhead power lines and although there had been multiple deaths and injuries to sailors using Coast Catamaran's boats, the mast and rigging failed to incorporate insulating materials to protect sailors from death or injury from such hazards.

The Respondents invoked admiralty jurisdiction, 28 U.S.C. § 1333 and 46 U.S.C. § 740, against Tideland. The Respondents invoked diversity jurisdiction, 28 U.S.C. § 1332, against Coast Catamaran and sought to apply admiralty law pursuant to the "saving to suitors" clause of 28 U.S.C. § 1333(1).

Tideland moved to dismiss the complaint for lack of subject matter jurisdiction. Coast Catamaran moved for partial summary judgment to obtain a pre-trial ruling that state law rather than admiralty law applied to the Respondents' cases.

The District Court denied the motions and certified its decision for interlocutory appeal to the Fourth Circuit.

The Fourth Circuit's decision was rendered on January 8, 1986. 781 F.2d 1022. The trial commenced in the District Court on January 13, 1986. The jury returned its verdict against the Tideland and Coast Catamaran on February 21, 1986.

In answer to specific issues, the jury found that Tideland had violated statutes regulating matters pertaining to navigation and that the violations were a contributing cause to the collision between the sailboat mast and the power line. Tideland was also held to be negligent in the design, construction, inspection, and maintenance of the power line. Coast Catamaran was held to be negligent in the design and manufacture of a sailboat reasonably safe for its intended use. The jury also found Coast Catamaran strictly liable under § 402A of the *Restatment (Second) of Torts*. The deceased sailors were held to have been partially at fault, and the damage awards were reduced accordingly.

A judgment against Tideland and Coast Catamaran was entered on February 24, 1986. Tideland and Coast Catamaran filed motions for judgment notwithstanding the verdict. On April 11, the District Court entered an order denying the motions for judgment notwithstanding the verdict. An amended judgment was entered on April 11. On May 9, Tideland filed written notice of appeal. Coast Catamaran filed notice of appeal on May 21. Neither Petitioner has requested a new trial below. The only issues they raise on the post-trial appeal to the Fourth Circuit relate to prejudgment interest and joint and several liability. No errors have been assigned as to the issues submitted to the jury, as to the sufficiency of the evidence, or as to the adequacy of the District Court's instructions to the jury.

Thus, the Petitions of Coast Catamaran and Tideland seek review by this Court of an interlocutory decision of the Fourth Circuit in a case that has subsequently been heard in a six-week trial before a jury on the merits.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The respondents Charles R. Hassinger, Administrator of the Estate of Stanley H. Hassinger III, Janet Mead Proctor, Administratrix of the Estate of Robert Diego Proctor, and James B. Powell, Administrator of the Estate of Stuart L. Powell ("Respondents") respectfully request that this Court deny the petitions for writ of certiorari seeking review of the opinion of the Court of Appeals for the Fourth Circuit in this case. The Fourth Circuit opinion is reported at 781 F.2d 1022 (4th Cir. 1986). The opinion of the District Court is reported at 627 F. Supp. 65 (E.D.N.C. 1985).

A. The Mean High Water Line is the Boundary of Navigable Waters Under the Admiralty Jurisdictional Statutes, 28 U.S.C. § 1333 and 46 U.S.C. § 740.

The Respondents contend that the Fourth Circuit was correct in ruling that the boundary of navigable waters in tidal waters is the mean high water line. Coast Catamaran implicitly agrees, for it does not raise any issue as to admiralty situs in its Petition. Tideland is the only Petitioner to raise any question as to admiralty situs.

The issue is whether the boundary of "navigable waters" that determines admiralty situs should be an ephem-

eral, fluctuating boundary or a predictable, fixed boundary. The Fourth Circuit and the District Court rejected Tideland's contention that admiralty jurisdiction should ebb and flow with the tide. In doing so, they followed the unanimous federal precedent that looks to the mean high water line in all similar questions of federal authority.

In *Willink v. United States,* 240 U.S. 572 (1916), this Court acknowledged the mean high water line as the boundary in tidal waters of the public right of navigation and the federal navigational servitude. The mean high water line was also chosen as the legal boundary of tidal lands in *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10 (1935). The mean high water line has become "the inveterate standard to be applied in limiting federal authority over navigable waters." *United States v. Holland,* 373 F. Supp. 665, 671 (M.D. Fla. 1974).

Tideland's Petition merely hints at a constitutional issue as to the scope of admiralty situs in this case, but Tideland neither cites nor discusses any cases to support the suggestion.

The water's edge has never been a boundary of constitutional significance in admiralty. Four examples may be cited to prove the truth of this assertion. First, the Extension of Admiralty Act, 46 U.S.C. § 740, expressly extended admiralty jurisdiction to injuries or damage "done or consummated on land" caused by "a vessel on navigable water." The Ninth Circuit held the Act to be a constitutional exercise of the power of Congress to give jurisdictional authority to the lower federal courts under article III, section 1, of the Constitution. *United States v. Matson Navigation Co.,* 201 F.2d 610 (9th Cir. 1953).

Second, the Longshoremen's and Harbor Workers' Compensation Act extended coverage under 33 U.S.C. § 903(a) for injuries to harbor workers and longshoremen on "navigable waters of the United States." That phrase was defined to include wharfs, dry docks, piers, terminals, marine railways, and other appurtenances of land. The constitutionality of the Act under article III, section 1, was upheld by the Fourth Circuit in *Newport News Ship Building and Dry Dock Co. v. Graham,* 573 F.2d 167 (4th Cir. 1978), *cert. denied,* 439 U.S. 979 (1978), and by the Third Circuit in *Dravo Corp. v. Maxin,* 545 F.2d 374 (3d Cir. 1976), *cert. denied,* 433 U.S. 908 (1977).

Third, this Court has also held that the Jones Act, 46 U.S.C. § 688, created substantive maritime rights for injuries on "land" beyond the water's edge. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36 (1943). And fourth, in the same case this Court acknowledged that the ancient admiralty remedy of seamen for maintenance and cure applied to injuries incurred on land. 318 U.S. at 41-42.

Thus, the only real question as to admiralty situs raised by Tideland's Petition is whether the jurisdictional statutes, 28 U.S.C. § 1333 and 46 U.S.C. § 740, were correctly applied by the Fourth Circuit.

It is arguable that the statutory grant of admiralty jurisdiction in 28 U.S.C. § 1333 should be given its full constitutional scope, since the statute uses the constitutional phrase "admiralty or maritime jurisdiction." *Ex parte Easton,* 95 U.S. 68 (1877). Mr. Justice Holmes alluded to such a broad interpretation of the statute when he said, "But Congress cannot enlarge the constitutional grant of

power, and therefore if it could permit a libel to be maintained, one can be maintained now." *The Blackheath,* 195 U.S. 361, 365 (1904). However, the decision of the Fourth Circuit in the present case did not require stretching 28 U.S.C. § 1333 to its constitutional limits. The most restrictive interpretation of the locality requirement, *The Plymouth,* 70 U.S. (3 Wall.) 20 (1865), required only that the cause of action be completed "on navigable waters." 70 U.S. (3 Wall.) at 36. The holding of the Fourth Circuit is that "navigable waters" include all areas seaward of the mean high water line, regardless of the state of the tide at the moment of injury.

As a matter of statutory construction, the Fourth Circuit's definition of "navigable waters" is consistent with all other federal cases and statutes which have addressed the scope of federal authority over navigable waters. For example, the Rivers and Harbors Act, 33 U.S.C. § 403, extends the jurisdiction of the Army Corps of Engineers to navigable waters of the United States. The Act has been uniformly interpreted to extend to the mean high water line in tidal waters. *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978); *United States v. Stoeco Homes, Inc.,* 498 F.2d 597 (3d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975).

As a further example, Congress used the "line of mean high tide" to define the extent of "lands beneath navigable waters" in tidal areas in the Submerged Lands Act, 43 U.S.C. § 1301(a). The same definition was incorporated by reference in the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a).

The case cited by Tideland, *Boudlouche v. Conoco Oil Corp.*, 615 F.2d 687 (5th Cir. 1980), is not in point. The pertinent fact in that case was that the boat in question "was completely removed from the water" when it fell from a crane and came to rest "landward" when it dropped. 615 F.2d at 687-88. The court's ruling was based on the fact that the vessel was entirely ashore, and there was no necessity of determining the boundary of navigable waters as in the present case.

Tideland cites no decisions for the argument that receding of tidal waters below the mean high water line would divest an admiralty court of jurisdiction. The research of the Respondents has located no such cases. To the contrary, in *The Steamship Jefferson,* 215 U.S. 130 (1909), this Court held that a vessel that was in a dry dock from which the water had been removed was within the admiralty jurisdiction and subject to a salvage claim. This Court said:

> In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land.
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> 215 U.S. at 142.

Accord, Dailey v. City of New York, 128 F. 796, 798 (S.D.N.Y. 1904).

Robert M. Hughes, in his *Handbook of Admiralty Law* (2d ed. 1920), also recognized that the shoreward

limit of admiralty jurisdiction should be determined by the usual state of the waters, not the state of the waters at a particular time, when he said that jurisdiction is not removed by a low tide:

> The admiralty jurisdiction in matters of tort exists over all navigable waters, as explained in a previous connection. This includes canals. But it includes only navigable waters in their usual state. *For instance, a stream that is navigable at ordinary tides is none the less within the jurisdiction because it happens to be bare at an unusually low tide;* and, conversely, when a navigable river is widened by freshets far beyond its usual banks and overspreads the adjoining country on either side, it does not carry admiralty jurisdiction with it. Hence, in the Arkansas, a steamer which, during a flood, was far out of the regular channel, and collided with a house, which was usually inland, was held to have committed no marine tort.
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> R. Hughes, *Handbook of Admiralty Law* (2d ed. 1920) at 195-96 (emphasis added).

Tideland argues, perhaps facetiously, that the mean high water line is an "imaginary" line. (Petition at p. 6.) Rather, it is a predictable, scientific boundary that can be determined by survey. It is the best measure of "the land which is actually covered by the tides most of the time," *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 26 (1935), and therefore is the best measure of the usual state of the waters.

It has been held that there is no expansion of admiralty jurisdiction beyond the ordinary high water mark when the waters flood. *The Arkansas,* 17 F. 383 (S.D. Iowa 1883). It would be inappropriate to apply a different rule and contract the admiralty jurisdiction when the waters ebb. The Fourth Circuit was correct when it held that the

admiralty jurisdiction extends to mean high water line at all times.

Thus, Tideland has failed to show any conflict in federal decisions or any error in the rule of situs approved by the Fourth Circuit. To the contrary, the Fourth Circuit has followed the overwhelming weight of federal authority, and there is no substantial reason for this Court to address a question of admiralty situs that is in harmony with all significant cases and statutes.

B. The Beaching of a Sailboat is a Traditional Maritime Activity.

The Fourth Circuit correctly approved the finding of the District Court that the sailboat was still engaged in traditional maritime activity and had not been removed from navigation as it was being beached. The District Court said (627 F. Supp. at 71):

> First, the act of beaching a vessel does constitute traditional maritime activity. Historically, and even today, vessels are pulled up on the beach with regularity. This act is an ancient and practical solution to the problem of removing the boat from the reach of the tides. As discussed previously, until a vessel is so removed, it remains in navigation.

Boats designed for beaching are not modern inventions. "Throughout Greco-Roman antiquity, the craft that tramped from coastal town to coastal town or between small islands often loaded and unloaded off beaches without benefit of harbor installations of any kind; there is every reason to think Bronze Age cargo carriers did the same." L. Casson, *Ships and Seamanship in the Ancient World* (Princeton 1971) at 361-62.

This Court has taken a similar view when it held that a vessel moored to the dock at the end of a journey did not become part of the land and was still in navigation so that an injury occurring on board the vessel was within admiralty jurisdiction. *Leathers v. Blessing,* 105 U.S. 626 (1881). The Court said:

> Although a suit might have been brought in a common law court for the cause of action sued on here, the district court, sitting in admiralty, had jurisdiction of this suit. The vessel was waterborne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf and that she had communication with the shore by a gang-plank, did not make her part of the land or deprive her of the character of a waterborne vessel.

105 U.S. at 629.

The Hobie Cat sailboat was specifically designed to be launched and beached on the shore. It was therefore being used in a normal and appropriate fashion as the three sailors were attempting to drag it beyond the reach of the tide. There is no dispute about the findings of the District Court that the boat had not been removed beyond the mean high water line when it struck the overhead power line of Tideland Electric Membership Corporation and caused the deaths of the sailors. 781 F.2d at 1028. The District Court found that the power line was an obstruction to navigation, 627 F. Supp. at 71-72, and the Fourth Circuit agreed, 781 F.2d at 1027-28.

The grounding or beaching of boats is a subject of maritime concern in the Inland Rules. The Rules apply to vessels of any type on inland navigable waters of the United States. Rules 1(a) and 3(a), 33 U.S.C. §§ 2001(a) and 2003(a); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982). Furthermore, a vessel need not be "underway" as defined in Rule 3(h), 33 U.S.C. § 2003(h), nor must it be afloat on the water to be governed by the Rules. The Rules require vessels that are "aground" in navigable waters to exhibit certain lights and shapes, although small vessels of less than twelve meters are exempt from that requirement.[3] Rule 30(d) and (f), 33 U.S.C. § 2030(d) and (f).

Since navigable waters are often subject to the ebb and flow of the tide, to subsidence from drought, or to the shifting of sandbars, the rules of navigation must necessarily encompass vessels that have been temporarily "stranded" on navigable waters, whether by intent or circumstance. Although the Respondents do not contend that any of the Inland Rules apply to the deaths in question, it is clear that the grounding or beaching of boats below the mean high water line is a traditional subject of maritime concern.

Thus, Tideland has failed to show any conflict in federal decisions or any error by the Fourth Circuit in the analysis of admiralty nexus required by *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

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[3]The Hobie Cat sailboat in this case was approximately eighteen feet long, less than six meters.

C. The Wrongful Death of Sailors in Navigable Waters Caused by a Defective Sailboat Mast is a Proper Subject of Admiralty Jurisdiction.

A fair statement of the wrong alleged by the Respondents is that the sailors were wrongfully killed in navigable waters by a negligently designed, dangerously defective sailboat mast which was unreasonably dangerous when used for its intended purposes, including launching, beaching, and sailing in navigable waters. Coast Catamaran's argument is based on its own narrow definition of the "wrong." Coast Catamaran says, "The wrong charged was a failure to eliminate the conductivity of the aluminum mast of a Hobie Cat sailboat." (Petition at p. 7.)

The Fourth Circuit applied the four-factor analysis of admiralty nexus which was first utilized in *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974). The same analysis had been previously adopted by the Fourth Circuit in *Oman v. Johns-Manville Corporation,* 764 F.2d 224 (4th Cir. 1985), *cert. denied,* — U.S. —, 106 S.Ct. 351, 88 L.Ed.2d 319 (1985).[4] The Fourth Circuit found that Coast Catamaran was a manufacturer, marketer, supplier, and seller of catamaran sailboats; that

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[4]The four-factor analysis of the Fifth Circuit in *Kelly v. Smith* has achieved wide-spread acceptance among the other Courts of Appeals. *E.g., Drake v. Raymark Industries, Inc.,* 772 F.2d 1007, 1015 (1st Cir. 1985), *cert. denied,* — U.S. — (May 19, 1986); *Edynak v. Atlantic Shipping, Inc.,* 562 F.2d 215, 221 (3d Cir. 1977), *cert. denied,* 434 U.S. 1034 (1978); *St. Hilaire Moye v. Henderson,* 496 F.2d 973, 978-79 (8th Cir. 1974) *cert. denied,* 419 U.S. 884 (1974); *Solano v. Beilby,* 761 F.2d 1369, 1371 (9th Cir. 1985); *Harville v. Johns-Manville Products Corp.,* 731 F.2d 775 (11th Cir. 1984). There is no conflict among the circuits as to whether this four-factor analysis is appropriate.

the vehicles were "obviously maritime;" that the injuries were caused by an allegedly defective mast; and that the purpose of admiralty law was to protect sailors from defective equipment while engaged in maritime activity. 781 F.2d at 1028. The Fourth Circuit also approved the finding of the District Court that the sailors were engaged in an act of traditional maritime activity as they were beaching the sailboat in navigable waters. 781 F.2d at 1027-28.

Coast Catamaran argues that because one may be electrocuted on land by use of an aluminum ladder, electrocution in navigable waters by a sailboat mast is not an injury of maritime concern. (Petition at p. 9.) By Coast Catamaran's reasoning, the fact that one might drown in a swimming pool because of a defective life vest would mean that a sailor who drowned at sea for a similar reason would not be a matter of concern to admiralty. If the product is intended to be used in the maritime environment by people engaged in maritime activities, and if the injury occurs within that context, the wrong is a matter of maritime concern, despite the fact that it might occur under analogous circumstances on land.

"In determining whether the causation and nature of injury had a sufficient maritime flavor, other courts have focused on the site of consummation of the injury rather than on the origin of the negligent act or omission." *Solano v. Beilby*, 761 F.2d 1369, 1372 (9th Cir. 1985) (longshoreman injured by automobile with defective brakes being loaded on ship). That appears to be the accepted view in defective product cases. *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982) (death in navigable waters caused by defective helicopter); *Sperry Rand Corp. v. Radio Cor-*

poration of America, 618 F.2d 319 (5th Cir. 1980) (grounding and collision caused by defective gyro-pilot steering system not designed exclusively for marine use); *JIG The Third Corporation v. Puritan Marine Insurance Underwriters Corp.*, 519 F.2d 171 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976) (sinking of shrimp boat caused by defective design and manufacture of shaft assembly); *Jones v. Bender Welding & Machine Works, Inc.*, 581 F.2d 1331 (9th Cir. 1978) (property damage to vessel caused by defective caterpillar engine adopted for marine use); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (sinking of vessel caused by defective Caterpillar engine); *Miller Industries v. Caterpillar Tractor Co.*, 733 F.2d 813 (11th Cir. 1984), (economic damages caused by defective Caterpillar engine).[5] There is no conflict in the circuits on this point.

Coast Catamaran also says that it was purely "fortuitous" that these electrocutions occurred on navigable waters. (Petition at p. 7.) That assertion overstates the case, for it is obvious that the boat was being used in a manner within the intended use of the boat. An intended use is reasonably expected, not fortuitous. Perhaps if the sailboat mast were being erected as a flag pole on the top of a skyscraper, the manner of its use would be justly termed "fortuitous," but that is not the case here.

The unspoken objection which seems to underlie Coast Catamaran's argument is that these were recreational

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[5]There is an obvious analogy between a marine engine and a sailboat mast. The District Court described the Hobie Cat mast as "an integral component of the vessel, and indeed one indispensable to its navigation." 627 F.Supp. 74.

sailors maneuvering a recreational vessel. Indeed, that is the only distinction that may properly be drawn between the present case and the product liability cases cited by Coast Catamaran in its brief, but it is not a valid distinction after *Foremost Insurance Company v. Richardson,* 457 U.S. 668 (1982). Admiralty's concerns extend to recreational sailors engaged in traditional maritime activities. The Fourth Circuit correctly held that the nexus test of *Executive Jet* was satisfied.

Thus, Coast Catamaran has failed to show any conflict in federal decisions or any error by the Fourth Circuit in the analysis of admiralty nexus required by *Executive Jet.* To the contrary, the Fourth Circuit followed the overwhelming weight of federal authority in the courts of appeals, and there is no reason for this Court to address a question of admiralty nexus in which all cases are in harmony.

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CONCLUSION

The petitions for a writ of certiorari should be denied. The Fourth Circuit's decision is not in conflict with the decisions of this Court or of any circuit court of appeals. There are no constitutional issues. There are no important federal questions meriting the attention of this Court.

Respectfully submitted,

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Dated June 6, 1986

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